NO. 80-1725

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BENNETT GOLDSTEIN and JAMES EDWARD KERN

Petitioners,
v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the Government agents' seizure of the Petitioners' personal luggage from an airline baggage cart, and the subsequent inspection by a Government K-9 unit, violated their Fourth Amendment rights and that there was insufficient evidence to sustain their jury convictions. For the reasons

stated herein, the Petition for a Writ of Certiorari should be granted.

1. Presently, interstate travellers are without certainty as to the extent to which their personal belongings can be legally subjected to Governmental seizure and inspection. In the case sub judice, the United States Court of Appeals for the Fifth Circuit held that a traveller's personal luggage can be seized from an airline's baggage cart by Government agents, and then subjected to a Government K-9 unit inspection, in the absence of probable cause or even reasonable or articulable suspicion. United States v. Goldstein, 635 F.2d 356, 360-362 (5th Cir. 1981) (Pet. App. A.13-18).

Contrary to the Government's contention in its Memorandum in Opposition

(Gov. Opp. 5), there is currently a division in the Circuit Courts as to the proper standard to apply before personal luggage can be legally seized and then subjected to a Government K-9 unit inspection. The United States Court of Appeals for the Seventh Circuit requires that reasonable suspicion exist prior to the seizure of a traveller's luggage in order to subject it to a Government K-9 unit inspection. United States v. Klein, 626 F.2d 22, 27 (7th Cir. 1980). In United States v. Benjamin, No. 80-2143, 29 Cr L. 2090, 2091 (7th Cir. March 26, 1981), the Seventh Circuit specifically reiterated that "[i]n Klein, we held that detention of suitcases belonging to two drug suspects was permissible since there was 'reasonable suspicion to believe that the suitcases contained contraband'." Following the logic of Klein, supra, and

United States v. Van Leeuwen, 397 U.S. 249 (1969), the court in Benjamin required that reasonable suspicion exist in order for an FBI agent's seizure of a suitcase to be constitutional. Similarly, in United States v. Viegas, 639 F.2d 42 (1st Cir. 1981), cert. denied, No. 80-1344, 29 Cr.L. 4041, the United States Court of Appeals for the First Circuit relied upon Klein and Van Leeuwen in requiring that reasonable suspicion exist to justify a detention of personal luggage. Since there is currently a division in the Circuit Courts, interstate travellers cannot know when and under what circumstances the Government can lawfully seize their personal luggage. 1/

1/ The instant case involves a seizure unlike the usual airport search which
(Footnote continued on following page.)

2. Furthermore, the Government's use of a K-9 unit to detect cocaine cannot be likened to a plain smell detection by a human law enforcement agent. [2] Dogs

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[1] (Footnote continued from previous page.)
society expects and to which it has become accustomed. Such airport searches are usually intended to detect weapons that might be used in airline hijackings. Examples include the regular screening of all flight passengers by magnetometers and the examination of all carryon luggage. Moreover, the public is usually given notice of these types of inspections by signs that are conspicuously posted. On the other hand, seizures of non-carryon baggage for the purposes of effectuating inspections by Government K-9 units are not routine insofar as the public is aware. Nor is there notice of such seizures and inspections posted at passenger check-in points. It may come as quite a shock to many interstate travellers that their baggage can be scrutinized by Government K-9 units every time they board an airplane, regardless of whether the Government suspects them of any wrongdoing.

[2] It has never been contended that the cocaine in this case, or in any other case for that matter, was detectable by human beings. Its detection was solely attributable to the K-9 unit's olfactory senses, which were at least 1000 times that of an ordinary human being.

are not human beings, and the use of their super sensitive olfactory senses is no different than the use of other enhancement aids utilized by the Government. Jones v. Latexo Independent School District, 499 F.Supp. 223, 232-233 (E.D. Texas 1980); see Katz v. United States, 389 U.S. 347 (1967) (use of electronic listenting device to overhear conversations in public telephone booth unconstitutional); United States v. Taborda, 635 F.2d 131 (2d Cir. 1980). Contrary to the Government's argument (Gov. Opp. 4), when a person places a substance in luggage, and that substance is not detectable to the senses of a human being, that person has not exposed the substance to the public.

Accordingly, since the contents of the Petitioners' baggage was not detectable

by the human senses, the Petitioners' expectations of privacy were violated when the Government K-9 unit inspected their luggage and determined the contents therein. [3]

3. The Government's response to Petitioners' argument concerning intent to distribute is wrong on both counts.

First, at least two decisions squarely support Petitioners' claim that quantity alone, without any evidence to give that quantity meaning, does not prove intent to distribute. In United States v. Clayborn, 383 F.Supp. 1186 (W.D. Texas, 1974), the court refused to "guess" an

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[3] Whether the Petitioners were inconvenienced by the Government's actions is not determinitive of the issue. In virtually all of the cases involving the use of sensory enhancement devices, the person to which the device was directd was not inconvenienced since in only the rarest of cases will that person ever know contemporaneously that the device was even being utilized.

intent to distribute despite the defendant's possession of 161 grams of heroin. The same result was reached in United States v. Owens, 344 F.Supp. 1355 (W.D. Texas, 1972), aff'd, 475 F.2d 759 (5th Cir. 1973), where 26 grams of heroin were possessed.

Secondly, the additional evidence of intent to which the government points is at best neutral - it in no way establishes an intent to distribute rather than an intent to possess for personal use. The cited evidence consists of (1) the fact that their luggage contained a butane torch and stand, a glass beaker, and a substantial amount of cash, [4] (2) an overnight stay, and

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[4] Just as the significance, if any, of the quantity of cocaine was left unexplained, the government made no effort to explain what, if anything, these items showed about cocaine trafficking.

(3) a ticket in an assumed name. If this evidence means anything, it certainly does nothing to distinguish between persons who have purchased a quantity of illegal drugs for personal use from those who have made a purchase with the intent to distribute it. If these factors indeed distinguished one from the other, there was certainly no attempt made to show, for example, that "distributors" use assumed names, or, for example, that those who merely wish to purchase drugs for their own use do not make overnight trips.

In conclusion, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 1981 three true and accurate copies of this Reply to the Memorandum For The United States In Opposition To The Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, first class, postage prepaid, to the Office of the Solicitor General, Department of Justice, Washington, D.C.

JOHN KENNETH ZWERLING